Cross-X Dr. Stammberger (by MW)

1 IN THE CIRCUIT COURT FOR THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

2

3 GENERAL JURISDICTION DIVISION

4

Case No. 00-01706 CA 22

5

LYNN FRENCH,

6

Plaintiff,

7

vs.

8

PHILIP MORRIS INCORPORATED,
9 ("PHILIP MORRIS U.S.A.")
R.J. REYNOLDS TOBACCO COMPANY,
10 LORILLARD TOBACCO CO., and
BROWN & WILLIAMSON TOBACCO
11 CORP., Individually and as Successor
to the AMERICAN TOBACCO COMPANY,

12

Defendants.

13 ----------x

14

PROCEEDINGS BEFORE
15 THE HONORABLE FREDRICKA SMITH
16 VOLUME 17
17 Monday, June 17, 2002
9:30 a.m. to 11:15 a.m.

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23

73 West Flagler Street
24 Courtroom 6-2
Miami, Florida 33130

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1 PROCEEDINGS
2 - - -
3 THE COURT: Good morning.
4 Is everyone ready, then?
5 Where were we in the video? Are we right
6 where we left off? Is it queued up?
7 MS. TEDDER: I think it is, Your Honor.
8 THE COURT: Okay.
9 (Jury enters courtroom.)
10 THE COURT: Good morning, everyone. Have
11 a seat, please. Welcome back.
12 We're going to continue with the
13 videotape that we started listening to on
14 Friday. I think this should be about another
15 hour's worth.
16 So let's proceed.
17 (Videotape deposition of Heinz
18 Stammberger, M.D. was played as follows:)
19 CROSS EXAMINATION
20 "BY MR. WEINSTEIN:
21 Q. You are not saying that any of my clients
22 are not suffering from chronic sinusitis, are you?
23 A. I did not have a chance nor was I ever
24 asked to see individual cases, so I have to assume
25 that this is a correct diagnosis.

1 Q. As a matter of fact, you have no way of
2 knowing whether or not my clients are not suffering
3 from chronic sinusitis, isn't that true?
4 A. That's true.
5 Q. You haven't seen any medical reports or
6 data regarding any of our clients, have you?
7 A. With the exception of those data that I
8 had to go through when I was asked to read earlier
9 depositions, no.
10 Q. Do you think you are testifying in favor
11 of the airline attendants?
12 A. You have just mentioned I don't know the
13 individual case with all its relevant data. I am
14 testifying to the fact can, to my knowledge,
15 chronic rhinosinusitis be caused by ETS or by
16 smoking.
17 Q. You are actually volunteering your
18 testimony, aren't you?
19 A. Yes, I have been asked would I be
20 ready -- let me start in a different way.
21 Q. You know what a volunteer is, don't you?
22 A. Yes, I do understand very well.
23 Q. In other words, you know that a
24 volunteer --
25 A. I have not been forced.

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1 Q. A volunteer, as we have an expression
2 here in the United States, was just say no. You
3 didn't opt to say no, but rather you volunteered
4 for a fee to testify in these cases, to give
5 testimony on a deposition to be presented against
6 or in favor, your testimony in favor of tobacco
7 companies against these airline attendants,
8 correct?
9 A. I see the tendency in this question, but
10 again I would like to stress I am not in favor of
11 smoking, of the tobacco industry.
12 I have been asked, and this was long
13 before talk was about money or fees, what is my
14 experience smoking in connection with chronic
15 rhinosinusitis and would I be willing to testify,
16 to make a deposition on this experience of mine.
17 Q. So you say this is long before you talked
18 about fees?
19 A. This is correct.
20 Q. Are you telling this jury that you would
21 have come here and testified for no fee?
22 A. This is not what I said, but I was asked
23 first what is my opinion, what is my experience in
24 this regard.
25 When the lawyers heard what my impression

1 is, I was asked would I be willing to testify this
2 and I said yes.
3 Q. As a matter of fact --
4 A. Sorry.
5 Q. I'm sorry.
6 A. And only then there was discussion on how
7 much would I be reimbursed for this and in the
8 earlier part of the deposition I made it clear and
9 explained how this occurred, that I had no idea how
10 much to ask for that, what the standards in the
11 United States would be, so I contacted U.S.
12 American colleagues of mine for advice.
13 Q. So you asked American doctors what you
14 should charge them, what you should charge the
15 tobacco companies, and then you agreed, correct?
16 A. Not what I should charge the tobacco
17 company, but what the reimbursement for the time
18 spent, say for an hour, in those depositions,
19 whether in connection with tobacco or not, in the
20 United States were.
21 Q. So you calculated how much money you make
22 in your regular job and decided to charge that much
23 or do you charge more per hour than you make in
24 your regular position, sir?
25 A. The way was such that I had no idea what

1 a colleague, a colleague from the United States in
2 such a situation would be reimbursed per hour.
3 This is what I asked and the recommendation, and I
4 already stated that this came from Professor David
5 Kennedy, was between 3- and 400 U.S. dollars, and
6 this is why I said for the middle and asked for 350
7 U.S. dollars.
8 Q. Is that more or less -- I move to strike
9 because it is not responsive.
10 A. Okay.
11 Q. I am asking you, is the amount that you
12 are charging more or less per hour than what you
13 make in your regular job?
14 A. I'm salaried at the university and I
15 would need to calculate, which I have not done, how
16 this would translate. Let me think. 350 times
17 8 -- as regards to my salary, but this is a very
18 rough calculation. It is about what I would end up
19 with my salary over the year.
20 Q. So you make almost a million dollars,
21 American dollars a year?
22 A. No, that's not true.
23 Q. Well, if you figure out $500 an hour and
24 then --
25 A. It's not 500, it's 350.

1 Q. 350?
2 A. There have only been two episodes so far
3 where I was reimbursed 500 U.S. dollars and this is
4 for those depositions.
5 Q. If you multiply 500 -- that's about at an
6 8 hour day is about $4,000 a week, correct? Excuse
7 me, it's $4,000 a day. Do you make $4,000 a day,
8 American dollars a day under your job?
9 A. Not on my salary, but in some situations
10 with special operations, et cetera, I may well do,
11 but over the year it does not end up because I
12 don't operate each and every day, I don't work each
13 and every day. We have holidays, we have leaves,
14 for which I am not on salary. This kind of
15 calculation was not in my mind when I accepted to
16 come here.
17 Q. I simply asked a simple question, whether
18 or not the 350 or 400 or 450 or $500 an hour, I
19 simply asked whether it was more or less than what
20 you make in your regular job and the answer could
21 have been simple. You could have simply said it is
22 more than I make in my regular job per hour,
23 correct?
24 Well, did you ask to examine any of these
25 nonsmoking airline attendants whom you are offering

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for a fee to testify for the tobacco companies?
A. Sir, I am sorry, but again, this is not a yes or no. From your way to phrase those questions, especially what you have in between your lines, which I am not naive enough to not sense, this implies that I would do it for the money and how could I answer not having seen any of the persons it's all about.
This was not what I was asked, and I go back to the beginning. I was asked my opinion and experience on chronic rhinosinusitis and smoking. I was not asked to give an opinion on any of those individual persons and on their individual cases.
Q. Did you review any of the medical records of any of the nonsmoking airline attendants who have a case in which your testimony is going to be presented?
A. No.
Q. What do you understand the clinical examination to be?
A. In the case of chronic rhinosinusitis, this, of course, would include an external examination. It would include looking into this person's nose with the speculum, with an endoscope, which is very important. It would include looking

into the back of that nose, taking the history, the symptoms, the duration, the medications the patient may have or may not have had, the effect of such a medication, duration, what kind of symptoms improved and depending on whether a patient had medication, what kind of treatments the patient had before I would go on and possibly ask for other things, like allergy testing, possibly x-rays, CT scans. This then would very much depend on the individual situation.
Q. I notice, Doctor, when you describe what you understood a clinical examination to be, you said taking a history, correct?
A. That is correct.
Q. When you say taking a history, a history is important, isn't it, doctor?
A. Of course it is important.
Q. As I understand your former testimony, your previous testimony to other lawyers and to us previously, as I understand your testimony, you don't even think it's important, you don't even think it's important in taking a history to determine whether or not someone is a smoker, isn't that true?
A. When it comes to someone with chronic

rhinosinusitis, this is true based on my experience over some 25 years dealing with these diseases.
Q. Can we agree that you think that taking, that it's not important to take a history to determine whether someone is a smoker and that that is partially true; isn't that correct?
A. Again, this is not a yes or no answer, though it is yes when it comes to chronic rhinosinusitis as I have seen over all those years and thousands of patients. It makes no relevance as regards to treatment or outcome of a treatment or cause of the disease whether or not patients who suffer chronic rhinosinusitis smoke or do not smoke or are exposed to ETS.
Q. Doctor, isn't it true that some 10 or 12 years ago you just gave up on asking questions about whether or not someone is a smoker; is that correct?
A. The same answer for the very same reasons. It does not mean I don't ask anymore. This is why there is no yes or no or black and white, but by and large, I have stopped to consider smoking, ETS a major a causative factor in rhinosinusitis.
Q. Again, Doctor, isn't it true, and what

you are really saying is that 10 or 12 years ago you just gave up on asking questions about whether or not someone is a smoker, correct?
A. As regards to this disease, yes.
Q. That is correct, it is not your routine, it is not a routine question that you asked for the last ten or 12 years, correct?
A. In those patients it's taken down in their history when they are inpatients, et cetera, but I do not have this question during my examinations of patients.
Q. Doctor, you think it's coincidental that people have symptoms and suffer from rhinosinusitis when they go on an airline and people are smoking all around them and they are suffering symptoms of sinusitis, and they come back and they have got to see a doctor and that's basically the times that they are suffering from sinusitis, you think that's a coincidence?
A. I don't think I ever said that in my previous statements and I don't mean that. The thing is that I have my doubts, unless proven otherwise, with the causative chain.
Q. So it can be proven to you otherwise and that data might be forthcoming in the future; isn't

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1 that correct?
2 A. No one knows what might be forthcoming in
3 the future, but up to today, we do not have a broad
4 body of evidence confirming that ETS is a
5 substantial causative -- sorry for all these
6 repetitions, but it's the same.
7 Q. Doctor, when you said we don't have a
8 broad body of evidence, have you ever investigated
9 or obtained or tried to obtain data to prove or
10 disprove whether or not second-hand smoke causes or
11 contributes to sinusitis on airline attendants
12 being subjected to that smoke-filled compartment,
13 have you ever conducted that type of experiment?
14 A. I have not done any tests what other
15 components might be up there or in any other
16 environment to promote this disease.
17 Q. Do you know of anybody who has ever
18 conducted those tests?
19 A. I am not aware.
20 Q. Doctor, you held up this book, your
21 lawyers or the lawyers for tobacco held up this
22 book that you were involved with.
23 If you look in here under T, in the
24 index, this book that you held up --
25 A. Okay.

1 Q. It doesn't say tobacco in here. Is there
2 any reference in here about tobacco?
3 A. Not that I knew, but I know that there
4 are --
5 Q. No, I am asking about the book, Doctor.
6 A. Yes. No, no, no, and I was trying to
7 answer it in this regard. There is mentioning of
8 potential effect of smoking at one or two or even
9 three places, but I don't think the word tobacco is
10 in there or mentioned in the references. I'm not
11 sure.
12 Q. So this book that you wrote and you held
13 up doesn't even mention tobacco, is that what you
14 are telling us?
15 A. That's not correct. It mentions smoking.
16 There is discussion with the state of the knowledge
17 we have then when it comes to a disease entity
18 which is called vasomotor rhinitis and they are
19 there one of the hypothesis was and still is that
20 exposure to tobacco smoke can trigger, via a
21 complex mechanism, nasal symptoms.
22 Q. So --
23 A. I think that is in it. I can't give you
24 by word or reference to it, but I remember that's
25 in.

1 Q. Is there anything in this book that says
2 that tobacco does not contribute or cause
3 sinusitis?
4 A. No. This statement that does not is not
5 in.
6 Q. Do you have any other book or any other
7 writing that says it doesn't?
8 A. I personally, no.
9 Q. So it's only -- so now what we find out
10 is that all the things you wrote, all the things
11 you wrote before the tobacco companies contacted
12 you, you never said anything about tobacco not
13 causing sinusitis and when they contacted you and
14 agreed to pay you the amount that you told them --
15 A. Sir --
16 Q. Just let me ask my question.
17 A. Yes.
18 Q. Now you for the first time are stating on
19 the record this theory that you have, isn't that
20 true?
21 A. If I may use your words, sir, I didn't --
22 I did not say that tobacco does cause it or does
23 not cause it. I tried to give reference in a fair
24 way to what we knew, what we thought we could prove
25 in those days and give reference to the other

1 discussions around what you heard at congresses,
2 conferences, et cetera.
3 And this was not the topic of this book
4 or any other writings, to prove by special
5 investigations that tobacco or smoking did or did
6 not cause it. There was no evidence. It was not
7 the discussion in those days and if you go to
8 nowadays, literature on sinusitis, it still is a
9 very small segment of publications dealing with
10 this.
11 Q. And at least you will admit it's an open
12 question at least in your mind, correct?
13 A. I never said anything else. All I said
14 is I don't have proved it is a causative factor.
15 Q. And you don't have -- you don't have data
16 or sufficient data as a scientist, which you claim
17 to be, that would prove or disprove whether or not
18 tobacco causes or doesn't cause or contribute to
19 sinusitis or its symptoms, correct?
20 A. With this not only my, but the standard
21 of our present knowledge where the effect of
22 tobacco or ETS is not up as one of the major
23 components.
24 Q. But you don't have evidence the other way
25 either; isn't that correct?

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A. Not in the scientific way that I did any trials, but seeing thousands of patients who do smoke, are exposed, are not exposed, do not smoke, it doesn't make any difference. This is what my experience comes from.

Q. How would you -- in the last ten or 12 years, sir, with all due respect, you don't even ask your patients whether they are smokers or nonsmokers or whether they are subjected to second-hand smoke, so how could you determine whether or not even the patients that you have seen are affected by tobacco smoke if you don't even ask that question --

A. Sir --

Q. -- in their history.

A. Okay, I am sorry. There are other is ways of realizing whether one is a heavy smoker or not. Patients would come up with a history like that, say where I work, at my working place, there is tobacco smoke. Whenever I go there, things turn worse or after a kind of treatment I get better or if I have surgery, I go back, symptoms start to flare up again.

This is not the case in my experience and this is where my statement comes from.

Q. So you are the kind of doctor that leaves it to the patient to tell you rather than you asking them whether they are a smoker, you expect them to volunteer well, I am suffering from sinusitis and it must be from tobacco because every time I go into a tobacco-filled area, I suffer from sinusitis. You leave it to them to tell you that, correct?

A. No, sir. You are twisting my statements in this direction. Sorry if I phrase it this way and I'm sorry to have to repeat again. All I mentioned is that from my experience, and this really is with many thousands of patients, more than we discussed about here, I have come to the conclusion that whether or not someone is smoking or exposed to smoking, and that came from the time when I still routinely was asking them, does not make any difference to their reaction to treatment, to the cause of the disease.

Q. Sir --

A. Yes.

Q. Have you ever taken aside a substantial number of nonsmoking airline attendants and conducted any tests whatsoever?

A. No.

Q. You don't even know of any particular -- you don't know any other scientist or any other person that has conducted such tests, correct?

A. No.

Q. Doctor, you have espoused some theory here based on you examining or treating people in Graz, is that the way you pronounce where you come from?

A. Graz.

Q. Am I saying it right now?

A. You are correct now.

Q. That's in Austria; is that correct?

A. That's right.

Q. Doctor, the theory that you have espoused here, that is, that tobacco smoke has no effect on sinusitis and so on or doesn't cause it, that's a theory of yours based upon examining people sort of like the general, just people who are not airline attendants, correct?

A. I mentioned that I have seen some, but I couldn't and still can't give a precise figure, but I have not conducted any specific studies on a group of nonsmoking airline attendants.

Q. As a matter of fact, Doctor, really, you will admit that overall, based on the numbers of

people that you have seen, you have seen very, very few airline attendants who are nonsmokers, isn't that true?

A. This is true, but if there would have been -- sorry, I have to add that -- any conclusions like that, someone would be able to show changes on the mucosa, on the molecular level, on whatever we considered to make up for chronic rhinosinusitis in a group of airline attendants which would separate these from the general population, smoking or nonsmoking, this would have been in the literature as a significant information to all of us, because we are eager to learn. But it is not there.

Q. The data and information is not there about nonsmoking airline attendants subjected to second-hand -- well, tobacco smoke, correct?

A. That this contributes to the changes we find in chronic rhinosinusitis.

Q. Doctor, how many airline, nonsmoking airline attendants live in Graz, Austria?

A. I do not know.

Q. And Doctor, you don't know how many airline attendants you saw that are nonsmokers, do you?

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A. I do not know.
Q. And you can't even give me a number, no matter how small it is, on how many you have seen?
A. No, I can't. To be fair, I have seen some. It's not a large number, but I can't give any precise number.
Q. You know that there are doctors who you have been informed that have given their opinions and their testimony that the tobacco smoke has either caused or contributed to sinusitis of their patient, you know that happens in this case?
A. I am not aware of papers or contribution to say that it has caused, but I know statements where smoking is seen as a contributing factor.
Q. So Doctor, as a matter of fact, what you are really telling us is that this is your theory, that tobacco smoke doesn't cause sinusitis and other doctors may have the theory or belief, that is treating doctors who see these people right after or shortly after they are on an airline flight and are suffering the effects of sinusitis and state that obviously the events are connected, what you are saying is that you disagree with that theory as to the effect of tobacco smoke in causing or contributing to sinusitis, correct?

A. I would have to see the individual case, but by and large, I repeat, chronic rhinosinusitis is not brought about by exposure to tobacco smoke. This is my experience.
Q. You realize in an airline, you stated it yourself, there is concentrated areas and pockets of smoke where 50 and 100, 150, 200 people are smoking at the same time, correct?
A. Yes.
Q. You yourself, when you got on an airline and looked at all that smoke in the back, you didn't want to sit in the back?
A. Correct.
Q. Or wherever all that smoke was accumulating, correct?
A. Correct.
Q. And it's not just one person smoking that maybe you might move in a restaurant because you don't want to be, you don't want to smell that one person smoking, you have got hundreds of people smoking that were permitted to smoke in the airlines, correct?
A. Correct. Can I add a but? I never said that smoking is a good thing. Again, I am repetitious. I never volunteered to sit in smoking

sections and have given the arguments why I wouldn't do so. But I have not seen any evidence that the smoke those people are exposed to, I am not saying it wouldn't be annoying, but the smoke caused their sinusitis if this is what has been proven, which I don't know. I have to assume.
Q. Tobacco smoke, you will agree, is an irritant, isn't?
A. It can, I am sure. I am sure there are people, and I mentioned it before, who can be irritated by being exposed to tobacco smoke.
Q. It is such an irritant that even you admit that it causes cancer of certain areas of the mouth and the nose?
A. I did not say -- I admitted of the mouth. There is literature to support that. We have evidence in many papers and trials. It's true for laryngeal, base of the tongue cancer. I did not say that it is proven for sinus cancer and with the same certainty that I argue on this, I have to say we lack evidence that it causes chronic rhinosinusitis.
Q. And of course, we know that the practice of medicine is not an exact science, correct?
A. That is correct.

Q. Opinions of doctors frequently differ?
A. They should, because that's what ignites discussion and research and carries us on.
Q. And the science itself constantly is moving, it's changing, you are learning new things all the time, correct?
A. Of course. That's the way of science and of research.
Q. I was asking you a few moments ago about medicine is not being an exact science and you are constantly learning new things and discovering what causes or contributes to diseases and it is just changing all the time, isn't it?
A. That's correct.
Q. That's why it's important to accumulate data and people or scientists or doctors undertake tests?
A. Correct.
Q. You have already admitted that no one has undertaken any tests in this specific regard, that is, of nonsmoking airline attendants, correct?
A. Correct, but -- okay.
Q. Well, then, at least we can agree on one thing, can't we, Doctor, that at least the science, the medical community, there is not broad

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1 acceptance of your particular theory, can we agree
2 on that?
3 A. In which regard?
4 Q. In regard to what you have testified to
5 here today.
6 A. I wouldn't say so.
7 Q. You wouldn't say what?
8 A. That there are many doctors who would
9 consider this an individual hypothesis. I think
10 many would share and do share the opinion that ETS,
11 especially ETS, cannot be seen as a substantial
12 contributing factor to chronic rhinosinusitis.
13 Q. And many doctors in the scientific
14 community feel the opposite, correct, that it does
15 contribute or cause sinusitis, correct?
16 A. Yes, sir. Again a but. What I am
17 saying, I always feel pushed in a direction or in a
18 corner I don't want to be. All I am saying is we
19 start to understand what changes in the mucosa of
20 the sinuses must be there that we can call that a
21 chronic rhinosinusitis, and it has not been shown
22 that ETS or smoking brings about those changes.
23 Q. Doctor, you know, you have already
24 testified that many doctors, you agree that it is a
25 theory and many doctors disagree with you, so can

1 we at least agree that your scientific theory has
2 not gained general acceptance in the scientific
3 community, we can agree on that, can't we?
4 A. Nor have the other way around.
5 Q. That's my point. In other words, your
6 theory and your statements that you have given here
7 during your testimony today and previously, that
8 is, the principle that exposure to second-hand
9 smoke cannot cause sinusitis has not obtained
10 general acceptance in the scientific community just
11 as, I want to be fair, just as the statement that
12 it does, that second-hand smoke does cause
13 sinusitis, that also does not have general
14 acceptance in the scientific community, would that
15 be a fair statement?
16 A. Correct, but you have to add if there is
17 a pendulum evidence that it is not is significantly
18 higher than evidence that it is.
19 Q. But it has neither theory, neither
20 statement has received general acceptance and broad
21 acceptance in the scientific community, you will
22 agree with that, though, won't you?
23 A. I have my problems with calling this a
24 theory. One is reality where you see thousands of
25 patients and in them it does not appear to make any

1 difference for the cause, development of the
2 disease or not whether or not those people have
3 smoked and this is where the experience comes from.
4 Q. Doctor, whatever principle, let's call it
5 not a theory but a principle.
6 A. Okay.
7 Q. All right, you are more comfortable with
8 that statement?
9 A. Okay.
10 Q. Can we agree that the principle that you
11 have espoused and the principle that's espoused by
12 others, that is, that it does -- that second-hand
13 smoke or tobacco smoke can cause sinusitis and your
14 principle, the principle that you have stated that
15 tobacco smoke cannot cause sinusitis, both of those
16 principles have not received general broad
17 acceptance in the scientific community, correct or
18 don't you know?
19 A. We don't know, but everyday experience
20 does not favor the principle that smoke is a
21 contributing factor. This is as of 20002.
22 Q. Doctor, just answer me directly.
23 A. Yes.
24 Q. Can we agree that the principle that you
25 have espoused here has not yet received broad

1 acceptance in the scientific community, sir,
2 because you don't have the data?
3 A. No one has any data in this regard.
4 Q. Right. So as a result of that at least,
5 can we agree that the principle that you have
6 espoused nor the contrary principle has not yet
7 received acceptance, broad acceptance in the
8 scientific community, can we agree on that?
9 A. No. It's not that simple, sir. We have
10 the clinical experience that by and large, and that
11 is not only my personal one, smoking cannot be seen
12 as the one or the major or the only causative --
13 Q. Doctor, all I am trying to establish so I
14 can get -- are you claiming here today that the
15 principle you have espoused has gained general
16 acceptance -- in the particular scientific
17 community, is that what you are claiming, and that
18 all of these other doctors who were testifying to
19 the contrary are not put of the scientific
20 community?
21 A. That's not what I said. We don't have
22 proof that smoking is a causative factor.
23 Q. And you don't have proof that it is or it
24 isn't, you have said that before, correct?
25 A. With the exception of two decades of

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1 clinical experience, I don't have a proof.
2 Q. Your clinical experience -- are you
3 talking about your own clinical experience, Doctor?
4 A. And that of many others.
5 Q. Tell me who else, tell me who else has
6 examined and collected data about nonsmoking
7 airline attendants.
8 A. Sir, this is not what I meant with my
9 last answer, but last time we talked briefly,
10 though, on a paper which just recently came out and
11 was a national survey of all of France, some 60 or
12 70 million inhabitants on sinusitis, and smoking
13 was mentioned, but it was not considered to be any
14 major impacting factor.
15 Q. Doctor, isn't it true that one doctor in
16 treating a patient usually is considered sort of
17 the captain of the ship in making a final
18 diagnosis?
19 A. In many cases this has to be the case,
20 yes.
21 Q. In most cases, incidentally, when
22 treating a patient for sinusitis, that would be the
23 ENT, correct?
24 A. Yes.
25 Q. Of course, we are talking about cases in

1 which the ENT is a treating doctor, correct?
2 A. Correct.
3 Q. You have mentioned, I always have
4 problems pronouncing it, Graz. What's the
5 population of Graz?
6 A. It's a quarter million.
7 Q. It's 250,000 people?
8 A. Maybe a few more. Yes, that's about it.
9 Q. But what you do know, from what I
10 understand and from questions previously asked, you
11 do know approximately how many ENT's there are in
12 the United States, don't you?
13 A. Not a concise number. I think last time
14 I gave a guess of somewhere between 7- and 9,000,
15 which I know from the numbers who attend the annual
16 meetings in the United States and I think someone
17 of you found out that there are 8,000 plus members
18 of the American Academy of Otolaryngology.
19 Q. Are you a member of the American --
20 A. I may have been once. You have to renew
21 that. I contributed to their educational program,
22 but I have not been for the last years.
23 Q. You are not licensed to practice in the
24 United States, are you?
25 A. No, I am not.

1 Q. Now, Doctor, nor are you a member of the
2 American Medical Association?
3 A. That's correct.
4 Q. Doctor, you are not suggesting that
5 American ENT's are less proficient or less
6 knowledgeable than you, are you?
7 A. I will never make that claim or that
8 statement.
9 Q. As a matter of fact, you don't consider
10 medical care in Graz any better than the medical
11 care provided in the United States, do you?
12 A. I don't know whether one can draw this
13 analogy for all specialities, but for the field of
14 ENT, there are areas, subspecialties where you have
15 American colleagues who have the cutting edge and
16 for other fields there may be some European groups,
17 but as I stated during my last deposition, I think
18 both Austrian and U.S. American overall medical
19 services in ENT have a very high comparable level.
20 Q. So you are saying that they are the same
21 or similar?
22 A. They are similar. I don't dare to say
23 they are the same, but they are on a similarly high
24 level.
25 Q. The knowledge that many ENT's, the 7- to

1 9,000 ENT's in the United States, they also have,
2 would necessarily would have experience, broad and
3 vast experience with sinusitis; is that correct?
4 A. Of course.
5 Q. You know that many American ENT's have
6 written and published and lectured at the same
7 lectures or seminars that you have attended,
8 correct?
9 A. Correct.
10 Q. And doctor, in other words, there are
11 interchanges of ideas between doctors and these
12 ideas frequently either are similar or different,
13 correct?
14 A. Correct.
15 Q. Just as you have learned that there are
16 differing opinions about the principle of whether
17 or not tobacco smoke causes or contributes to
18 sinusitis, correct?
19 A. This has not been a major topic at any of
20 the meetings so far that I can recall in the United
21 States.
22 Q. So it has not been discussed?
23 A. Not as one of the major topics, say, that
24 there would have been lectures at the courses that
25 I participated as on the teaching faculty and they

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1 dealt with sinuses and chronic rhinosinusitis. We
2 discussed the potential effect of smoking, but I
3 can't remember a single lecture from an American
4 colleague where they said that ETS would cause
5 chronic rhinosinusitis.
6 Q. Or not cause sinusitis?
7 A. Or not cause.
8 Q. So you haven't heard any doctor in the
9 United States lecture that tobacco smoke causes nor
10 doesn't cause sinusitis, correct?
11 A. Correct, but of course if one is
12 interested in causes and not that much in the
13 noncauses.
14 Q. But Doctor, mostly, wouldn't it be fair
15 to say that one of the reasons why you really gave
16 up asking patients that you have seen whether or
17 not they are smokers, whether they have been
18 subjected to second-hand smoke, whether they are
19 not, is because you were primarily interested in
20 treating them and treating the illness and trying
21 to give therapy, isn't that true?
22 A. This is not true because as you can see
23 from this book, there is already then, and the data
24 from that stemmed from the mid-80's to early 90's,
25 it was published in '91, you find chapters of

1 histology, morphological changes, so all the
2 surgical new techniques which are communicated in
3 this book, they resulted from what we would see in
4 the mucosa of patients with acute but basically
5 chronic rhinosinusitis.
6 Q. But Doctor, surgery is a form of
7 treatment, isn't it?
8 A. Of course, patients come and seek
9 treatment from you.
10 Q. And your primary interest, I would assume
11 all doctors are faced with that, your primary
12 concern was treating the patient, correct?
13 A. Part of my job was to offer a remedy to
14 those patients, which is treatment, but at the same
15 time, look at the book, the publications, we try to
16 understand the background to it, not just to base
17 our ideas and treatments on symptoms of the
18 patients or on CT scans.
19 Q. Now, Doctor, you have mention the word
20 data?
21 A. Yes.
22 Q. Doctor, as a matter of fact, isn't it
23 true that you don't list, when you examined
24 patients and maintained records, you don't list it
25 like that. You don't break patients down into

1 groups of various occupations, isn't that true?
2 A. This is true. It makes a significant
3 difference or importance when it comes to tumors,
4 but not for sinusitis. We did that, but we have
5 seen it doesn't make any, it has no significance,
6 so we don't do that routinely anymore.
7 Q. You have agreed that smoking is certainly
8 a nuisance, isn't it?
9 A. I have. Can be.
10 Q. Doctor, you are a scientist?
11 A. And a clinician, yes.
12 Q. Would you agree that in order to get the
13 proper data concerning nonsmoking flight attendants
14 and the effect on them, it could cause or may
15 contribute to causing sinusitis, a good way to do
16 it, I think you have agreed to this, a good way to
17 do it would be to take 2,000 flight attendants,
18 lock them up in a room or a closed container and
19 subject them to tobacco smoke for four, five, six,
20 seven hours a day, concentrated smoke, and then --
21 well, as I said, pipe in the fumes and then after
22 five, ten, 15, 20 years examine these flight
23 attendants and see what the effects have been and
24 whether or not a substantial number of them have
25 sinusitis, that would give you some data, wouldn't

1 it, but it would take 20 years maybe, but it would
2 give you data; isn't that correct?
3 A. Not necessarily would you have to take
4 that large number. Any number that statisticians
5 would say they can draw a conclusion from might do.
6 Of course, it's virtually impossible to conduct
7 such study over such a long period.
8 Number one, I don't know whether those
9 people you alluded to have been exposed over all
10 ten, 15, 20 years or whether shorter periods may
11 have surfaced, but basically what needs to be shown
12 is that after ruling out other contributing
13 factors, which might be, which might come in in
14 those patient groups, the kerosine, dry air, the
15 pressure, whatever, exposure of tobacco smoke would
16 bring about changes in the mucosa we see in chronic
17 rhinosinusitis.
18 Q. Doctor, that would be one way of
19 accumulating the data, correct?
20 A. Correct.
21 Q. But Doctor, isn't it true we already have
22 some of that data because we do have nonsmoking
23 airline attendants who were indeed locked up and
24 enclosed in a container, 30,000 feet up in the air,
25 and after five, ten, 15, 20 years, a substantial

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1 number of these nonsmoking flight attendants being
2 subjected to tobacco smoke, nonsmoking flight
3 attendants, have come down with sinusitis, we do
4 have that data, don't we?
5 A. I think what you suggested is or trying
6 to get over to me that we already have a group
7 unfortunately of those unlucky people who have, who
8 I pity, who have those symptoms.
9 The problem with this is have other
10 factors been ruled out? How can we come to the
11 conclusion that provided that even what Mr. Reilly
12 said, that everything would be there, that they
13 clearly would be suffering from sinusitis, that
14 everyone would agree that this is chronic
15 rhinosinusitis. Have we ruled out other things?
16 Can anyone prove this is due to the long-term
17 exposure when they were up in their flights?
18 Q. Can anyone disprove it?
19 A. That would be the science.
20 Q. Both ways?
21 A. One of the answers you get, and again, I
22 don't want to speak against those poor people
23 suffering a disease which can be extremely annoying
24 or bad. I just want to make the statement how can
25 we say it is the smoke?

1 From the scientist inside me, I would be
2 happy to learn. Maybe it would open a totally new
3 chapter in that, but the evidence we have for this
4 is small. Someone might come up and say well, it's
5 the pressure, the cold dry air, it's other
6 environmental factors. They have been living in a
7 polluted area. I don't know.
8 Q. Are you telling me --
9 A. No, I am not telling, sir. I am not
10 telling.
11 Q. Are you saying more likely than not it's
12 the cold dry air?
13 A. No, I didn't say that. I just said very,
14 very spontaneously just two or three factors which
15 came to my mind which someone might well think that
16 could be contributing factors as well.
17 Q. How about ozone, could it be ozone?
18 A. I have no idea on the percentage of ozone
19 in a cabin. I have no idea how the content of
20 ozone changes when there is ETS around. I do not
21 know. Does anyone?
22 Q. That's my point. You cannot tell me that
23 there is general acceptance as to what effect, what
24 effect the tobacco smoke has on nonsmoking airline
25 attendants 30,000 feet up in the air, isn't that

1 true? There is not general acceptance on that
2 principle?
3 A. There is no general acceptance on that
4 principle.
5 Q. Doctor, incidently, you stated last time,
6 do you know how many hours you have spent speaking
7 with the lawyers?
8 A. No, I have not. Again, I am afraid I
9 have to come up with the same, but I understand
10 when it comes to billing and listing of these, it
11 is in your hands and I understand has been
12 distributed to the other lawyers as well.
13 Q. Since the last time we met, since I think
14 it was November 27.
15 A. There was no contact. There was only one
16 contact when it came to establishing the date of
17 today, but otherwise there was no contact.
18 Q. You didn't speak with them?
19 A. No. Neither meet nor speak. And I spoke
20 with Mr. Larry Frarey and through him it was
21 communicated that this meeting was scheduled for
22 today.
23 Q. Sinusitis is a disease, isn't it?
24 A. Sinusitis is a disease.
25 Q. Doctor, what is tobacco smoke, is it a

1 solid, a liquid or a gas or a combination?
2 A. I think it's a combination. You have
3 particles suspended in air in the smoke, so smoke
4 has several phases.
5 Q. Do you know how many ingredients or
6 elements are in tobacco smoke?
7 A. No, I don't know. I think at that last
8 deposition I mentioned some of the ones that I
9 knew. We had others where we both had problems in
10 spelling the items in there, but I don't consider
11 myself an expert on all the ingredients of tobacco
12 smoke.
13 Q. Generally there may be hundreds or
14 thousands of ingredients in tobacco smoke as a
15 solid or a liquid or a gas, correct?
16 A. I do not know.
17 Q. And you do agree that the ingredients,
18 however, whatever they are, constitute irritants?
19 A. Several of them may well be. Several of
20 them even have been shown to be carcinogens.
21 Q. We have already gone through the
22 concentration of the tobacco smoke in an airline
23 cabin, you have already discussed that with us, how
24 concentrated it was; is that correct?
25 A. That is correct.

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1 Q. Far more than just somebody living at
2 home with a smoker where you have one person
3 smoking, correct?
4 A. Again, I mentioned then that I had no way
5 of knowing any exact data or percentages, but I
6 assume and we discussed air conditioning and
7 whether that would have an effect or not, but I do
8 not hold the absolute knowledge to what
9 concentration there is.
10 Q. Your own experience is it is pretty
11 concentrated, heavy, thick tobacco smoke on
12 airlines, when it was permitted, correct?
13 A. Yes, in the context that it would be at
14 times very annoying.
15 Q. Doctor, I have a few more questions. Is
16 there an overlap of specialties when it comes to
17 sinusitis or is the ENT the only specialist?
18 A. Of course, you overlap with the
19 radiologists because you want their expertise and
20 need their CT's. Sometimes you may overlap with
21 maxillofacial colleagues when you you talk about
22 maxillary sinusitis, and sometimes it overlaps, but
23 not in the area, but from concomitant disease with
24 the chest physician, internist when you talk about
25 sinobronchial syndrome.

1 Q. Like a pulmonologist?
2 A. Like a pulmonologist, yes, a chest
3 physician.
4 Q. And when it comes to trigger mechanisms,
5 when it comes to sinusitis, certain people may be
6 in the same, I'm not talking about tobacco smoke,
7 but some people may be exposed to the same
8 environmental elements and some might come down
9 with sinusitis and some may not, correct?
10 A. Right. This is what we have as the
11 distribution of such a disease over the population.
12 Q. Doctor, you basically studied, and I
13 think you have already told us, you grew up in and
14 were raised in Graz, in that area?
15 A. I live in Graz since 1967.
16 Q. Basically you studied medicine in that
17 area?
18 A. Correct.
19 Q. At two universities was it, one in Graz
20 and --
21 A. Other was in Cologne in Germany, yes.
22 Q. Doctor, is sinusitis a dormant illness?
23 A. Say again?
24 Q. A dormant illness.
25 A. Can you give me another word for that?

1 Q. Sleeping.
2 A. Dormant, sorry. My fault.
3 Basically I would say no. You will only
4 diagnose someone with sinusitis if he or she are
5 symptomatic and symptoms are an integral part of
6 having sinusitis. Not necessarily changes that you
7 see on an accidental x-ray where you have
8 thickening of mucosa, which usually is interpreted
9 by radiologists as sinusitis, must be sinusitis,
10 must be symptomatic, and I think we discussed that
11 during the last deposition in detail.
12 Q. Have you personally ever detailed or
13 taken down data -- I'm not talking about from
14 recollection or anything, data on whether or not
15 women or men are more susceptible to illness caused
16 by tobacco smoke?
17 A. No.
18 Q. Have you ever taken down data as to
19 whether women and men are more susceptible to
20 sinusitis, do you have any data on that?
21 A. We have data in this regard and there is
22 a slight preponderance in women, but it is not
23 statistically significant.
24 The other question was to sinusitis, of
25 course, and not -- because it's different with

1 cancer cases.
2 Q. Doctor, you will agree, and I think you
3 have testified to this previously, but I am not
4 sure. I wrote this down. Is this true, that you
5 admit that second-hand smoke, environmental smoke
6 can aggravate a preexisting condition of acute
7 sinusitis and chronic sinusitis?
8 A. Not with a word of aggravate. It can be
9 one of the factors if you have a person who is
10 susceptible to that where this can add more
11 irritation, but I'm sure I have not mentioned that
12 it is my experience that it can aggravate
13 sinusitis.
14 Q. So I put that down wrong?
15 A. I'm not saying that, but the way that you
16 asked me now, can it aggravate sinusitis --
17 Q. Preexisting condition of sinusitis, of an
18 acute sinusitis?
19 A. It can add in the individual case, the
20 hypothetical case, symptoms, aggravate a sinusitis.
21 Q. It can add to the symptoms -- well, the
22 person suffering from sinusitis only knows about
23 the symptoms, right? They know they feel worse and
24 they are having more problems, correct?
25 A. If they are susceptible to tobacco smoke,

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1 yes, this can be.
2 Q. Therefore, if a person is suffering from
3 either acute or chronic sinusitis if they are
4 subjected to environmental smoke, even though they
5 are nonsmokers, it can cause their symptoms to be
6 worse, that's basically what you are saying?
7 A. It can add other symptoms, yes.
8 Q. Would you classify smoke as a pollutant
9 to the environment?
10 A. When we talk about cigarette smoke and a
11 closed environment like a room with no ventilation,
12 then the answer could be yes.
13 Q. Doctor, would you agree that the effects
14 of tobacco smoke, of either smoking or exposure to
15 second-hand smoke, can be delayed?
16 A. I can hypothesize so and if you consider
17 the cancer situation, most likely this is the case.
18 Q. Doctor, I don't know if I got this down
19 right, so you tell me whether I wrote this down
20 during your last deposition. During the deposition
21 when other lawyers were asking, would this be a
22 quote? I only want a yes or no. Would you have
23 made this statement? "We don't know what causes
24 chronic sinusitis." Did you make that statement?
25 A. Correct.

1 Q. Okay, good.
2 When you say we, you are talking
3 primarily about you yourself and your experience,
4 et cetera, correct?
5 A. No, the ENT community.
6 Q. Well, a lot of doctors have given
7 opinions one way or the other, either based on the
8 principle you have espoused and others the other
9 way around, correct?
10 During this interval, did you discuss
11 anything with anybody?
12 A. As I stated before, there was only the
13 contact establishing the whereabouts of today's
14 meeting. There was no physical contact or no
15 other.
16 Q. Have you debated the issue and the
17 principle you have espoused with those doctors that
18 have voiced the principle or opinion that exposure
19 to tobacco smoke caused or triggered chronic
20 sinusitis, have you debated it with anyone?
21 A. Not with everyone, of course, because I
22 don't know who has a different opinion, but with
23 many whom I would meet over the last months,
24 especially as this now is going on, I have asked
25 for their opinion. All agreed that smoking is not

1 a good thing, but that there is no evidence that we
2 have a causative direct link that brings again the
3 mucosal changes we see in chronic rhinosinusitis.
4 Q. You are talking about the data that is
5 lacking, correct?
6 A. No, the fact of their clinical
7 experience."
8 (Videotape ended.)
9 THE COURT: Is that it?
10 What is the status of the Defendant's
11 case?
12 MR. REILLY: Defendants rest, Your Honor.
13 THE COURT: And is the Plaintiff going to
14 put -- call the Plaintiff to the stand very
15 briefly?
16 MR. WEINSTEIN: Yes, for one question.
17 THE COURT: Could you please come
18 forward? And we'll swear Ms. French in again.
19 This will be very brief.
20 THEREUPON,
21 LYNN FRENCH
22 having been first duly sworn, was examined and
23 testified as follows:
24 THE WITNESS: Yes.
25 PROFFER EXAMINATION

1 BY MR. WEINSTEIN:
2 Q. Lynn French, you're still under oath.
3 A. Yes.
4 Q. Ms. French, do you recall Dr. Persky
5 using an endoscope? That is the instrument that
6 was pulled out here by Dr. Torres.
7 A. Yes, I do.
8 Q. How many times and when do you recall it
9 being used?
10 A. Well, the first time was prior to my
11 surgery. And the next time was after the surgery,
12 after my nose had healed. And then I believe the
13 third time was prior to the '95 CAT scan.
14 Q. Is that any, without any expression, is
15 that something that you would --
16 MR. REILLY: Objection, Your Honor.
17 THE COURT: Sustained. Only on the basis
18 of your -- that that was going to be --
19 MR. WEINSTEIN: You remember that?
20 I have no further questions.
21 THE WITNESS: Yes.
22 THE COURT: Is there any cross
23 examination?
24 MR. REILLY: No, Your Honor.
25 (Witness excused.)

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1 THE COURT: Now all of the testimony has
2 been completed both for the Plaintiff and for
3 the Defendants; is that correct?
4 MR. WEINSTEIN: That is correct.
5 MR. REILLY: Yes, Your Honor.
6 THE COURT: Okay. We are still on the
7 schedule that we were talking about last
8 Friday and that is that the attorneys and I
9 are going to go over certain matters in regard
10 to the instructions that I will give you and
11 some other things that we have to take up.
12 So we'll do that today. And we'll have
13 the closing arguments tomorrow, Tuesday, at
14 9:15. Then the case will go to you for your
15 consideration after the closing arguments.
16 So probably some time around the lunch
17 hour, most likely what we'll do is have you
18 order your lunch and have it delivered to you
19 in the jury room while you're deliberating.
20 That's probably what we'll do tomorrow.
21 Depending how long they go. But if it works
22 out with the schedule, that's what we'll do.
23 So even though it's a very short day and
24 I'm sorry that we didn't complete it on
25 Friday, that will complete all the testimony.

1 You're excused until tomorrow, Tuesday, at
2 9:15 in the morning. Thank you very much.
3 (Jury exits courtroom.)
4 THE COURT: Okay. I have the
5 instructions and the verdict form from the
6 Defendants. I didn't get anything from the
7 Plaintiff.
8 MR. WEINSTEIN: I'm sorry, Your Honor.
9 THE COURT: I don't know if you've
10 exchanged.
11 MR. WEINSTEIN: We did, but we haven't
12 gotten together, so to speak.
13 THE COURT: Well, why don't we --
14 MR. REILLY: There's substantial
15 differences, Your Honor.
16 THE COURT: Okay. I haven't seen theirs
17 yet.
18 Let me see theirs.
19 How about the verdict form?
20 MR. REILLY: The verdict forms are
21 different.
22 THE COURT: You gave me the instructions.
23 I don't see the verdict forms.
24 MR. WEINSTEIN: You know, now that you
25 mention that --

1 MR. ENGRAM: Did you have a set for me
2 also?
3 MR. WEINSTEIN: Probably.
4 THE COURT: Wait. Here is something.
5 You've included it sort of in the
6 instructions. But I don't see a separate
7 verdict form.
8 MR. REILLY: Your Honor, I don't want to
9 forget our motion for directed verdict.
10 THE COURT: Right. I want to do that as
11 well.
12 MR. WEINSTEIN: We have one, too, judge.
13 THE COURT: May I see the verdict form
14 first?
15 MR. REILLY: Did you have ours, Your
16 Honor?
17 THE COURT: Yes.
18 MR. WEINSTEIN: I'm sorry, Your Honor. I
19 thought I had it prepared and I don't see it.
20 THE COURT: Are the only damages that
21 you're seeking noneconomic damages?
22 MR. WEINSTEIN: Yes. That makes it
23 simple.
24 MR. REILLY: Judge, you probably have
25 their verdict form in there.

1 THE COURT: I see it in the text of the
2 instructions. But I'd like a separate form.
3 I'll tell you what. Why don't I hear the
4 motions for directed verdict now and then
5 we'll recess and later this afternoon we'll do
6 the instructions.
7 MR. WEINSTEIN: Your Honor, I also -- we
8 can do that afterwards, I guess -- I also went
9 through the Surgeon General's Report and I Xed
10 out a lot of things. And I thought I'd give
11 it to Your Honor, but I'll give it to counsel
12 first.
13 MR. REILLY: Your Honor, as I recall the
14 instructions of Mr. Weinstein were, you could
15 select those portions of the '86 Surgeon
16 General's Report that stated what Dr. Richmond
17 or Dr. Burns said. Of course, there's nothing
18 in here regarding what Dr. Burns said. He
19 wants to submit the whole thing.
20 THE COURT: I think the way I left it
21 was, in effect, the portions of the Surgeon
22 General's Report of 1986 that I would allow
23 into evidence are, in fact, in evidence
24 already by reference to those portions through
25 the witnesses. That they have in effect been

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1 published to the jury through the witnesses
2 referring to those particular parts. So I
3 think they're really in evidence already.
4 And certainly it didn't comprise pages
5 and pages. It was, you know, several small
6 excerpts.
7 MR. WEINSTEIN: Well, I spent a lot of
8 time going through this. And what I did is
9 I -- in a lot of pages, I just took out a lot
10 of things. And I thought that Your Honor said
11 to take out that which is irrelevant.
12 Ordinarily, in all the other cases, we just
13 put the whole report in and people can refer
14 to what portions they want.
15 But I think it's relevant, judge, just it
16 has a foreword as to what they found, what the
17 conclusions, for example, you know, of each
18 section. And it explains like -- I took
19 out -- I took out, for example, after careful
20 examination, available evidence the following
21 overall conclusions can be reached,
22 involuntary smoking is a disease in healthy
23 nonsmokers. I took out many things, simple
24 separation of smokers and nonsmokers within
25 the same air space may reduce, but does not

1 eliminate.
2 THE COURT: That part was specifically
3 read -- maybe not, but I thought that that was
4 read by one of the witnesses.
5 MR. ENGRAM: Yes, Your Honor, your
6 recollection is correct, that specific section
7 was read in the evidence.
8 THE COURT: Through Dr. Richmond or who?
9 MR. ENGRAM: Yes, it was Dr. Richmond's
10 conclusion.
11 THE COURT: And I think, I didn't let in
12 the part about the cancer there. Like 1, 2, 3
13 and 4. And I let in 1, 2 and 4, or something
14 like that. So that's already in to the extent
15 that I was going to allow it in.
16 MR. WEINSTEIN: Also, judge, you know, I
17 just thought that, for example, if we can show
18 the jury, for example -- they put in a piece
19 from it, they've got one excerpt that's
20 actually written. If I can put in, I would
21 like to put in the report of the Surgeon
22 General, the letter to Congress, the letter to
23 the president pursuant to -- the foreword and
24 acknowledgments. I think that's very
25 important.

1 In other words, all the people that
2 participated in this report, Your Honor. And
3 the part, for example, where it expresses who
4 the editor is, where it shows Mr. Burns.
5 Acknowledgments, for example, judge. If I
6 could hand it up. You see what I mean. And
7 all of the people that participated in this.
8 And it adds, I think it does -- I think I'm
9 entitled to show the extensive investigation
10 that went into this.
11 THE COURT: What's the Defendant's
12 position?
13 MR. ENGRAM: Your Honor, I think, first
14 of all, not quite sure what it is that he's
15 intending to offer. He mentioned the letters
16 to the president and Congress. The foreword
17 contains many irrelevant statements with
18 respect to involuntary smoking and lung
19 cancer. They're not the results of any sort
20 of medical or scientific research. These are
21 public health pronouncements. I think the
22 Court had already ruled that this would be
23 cumulative evidence of the testimony,
24 particularly where the witnesses read the
25 excerpts directly from the Surgeon General's

1 Report. That's what Mr. Rosenblatt did with
2 Dr. Richmond.
3 So that this would place undue emphasis
4 and weight on the witness' testimony to allow
5 them to duplicate that and put that into
6 evidence again having already elected to use
7 those portions of the video where they read
8 from the report.
9 THE COURT: Let me just -- I'm not going
10 to let the substantive parts in again, but
11 maybe some explanation about what the Surgeon
12 General's Report is possibly.
13 MR. REILLY: Your Honor, it's all hearsay
14 on top of everything else.
15 MR. McCUE: And, Your Honor, cumulative.
16 MR. WEINSTEIN: It's an exception to the
17 hearsay rule when it's mandated and it must be
18 reported. It's clear.
19 THE COURT: Well, even if that exception
20 applies, I don't think it applies to every
21 part of the report, including, for example,
22 the letters and so on.
23 MR. WEINSTEIN: At least I'm entitled to
24 put in to show how -- the significance of it,
25 that it was mandated and look at the list of

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1 all the participants in that report. I'm
2 entitled to that.
3 MR. REILLY: Your Honor, regarding who
4 participated in it, it doesn't matter who
5 participated in it if it's not relevant to the
6 subject matter at hand. And whether or not
7 some physicians who have some involvement in
8 areas of medicine that are unrelated to our
9 litigation is totally irrelevant.
10 MR. WEINSTEIN: It's amazing the
11 different positions they take in different
12 cases. Downstairs in another case, they put
13 it in evidence and talked about and recited
14 things that were favorable to the tobacco
15 industry and talked about the '86 report. It
16 went in and they talked about --
17 THE COURT: Whatever happened in the
18 other cases may be interesting, but they're
19 different cases, some involve smokers, some
20 involve cancer. It's just a very different
21 situation.
22 MR. WEINSTEIN: But we're entitled to
23 show the work that went into it. And if they
24 testified as to the results --
25 THE COURT: I'll tell you what, I'm not

1 going to allow this in as a separate exhibit.
2 But anything that one of the witnesses said
3 about it and that has come into evidence, you
4 can certainly refer to in your closing. And I
5 think that probably Dr. Richmond explained
6 through questions by Mr. Rosenblatt what the
7 Surgeon General's Report was and when it was
8 done and so on.
9 So anything that was said, you can
10 certainly refer to. But I think, as I said
11 before, the parts that I thought were
12 relevant, including the part that the
13 Defendant wanted to put in about no
14 conclusions about ear, nose and throat
15 problems for adults and the ones that the
16 Plaintiff wanted to put in that you did get in
17 through Dr. Richmond, which I think included a
18 summary of their findings, you can refer to.
19 So all you have to go do is find the
20 portions where Dr. Richmond referred to it.
21 And I'll let you make those references.
22 Otherwise, you can mark this for ID and it
23 will not come in as a separate exhibit.
24 MR. WEINSTEIN: What I would like to do,
25 judge, then, is to mark the entire report.

1 THE COURT: Mark the entire report then.
2 MR. WEINSTEIN: Mark the entire thing.
3 THE COURT: I think I gave you the copy
4 back that you gave me.
5 Mark that for ID. Plaintiff's for ID.
6 MR. WEINSTEIN: Actually it is in, judge.
7 It's the health consequences -- it's already
8 marked.
9 THE COURT: What is that designation?
10 THE CLERK: It's Plaintiff's 1 B for ID,
11 composite.
12 MR. WEINSTEIN: Now what I would do is
13 now offer this.
14 THE COURT: That can be, fine. That will
15 be a separate ID as the one that's redacted.
16 MR. WEINSTEIN: Right.
17 THE COURT: Mark that as a separate one.
18 THE CLERK: Plaintiff's 1 CC for ID,
19 composite.
20 (Plaintiff's Exhibit 1 CC was marked for
21 identification.)
22 MR. WEINSTEIN: And for the record, I had
23 drawn green lines through --
24 THE COURT: You don't have to say that,
25 because it's now part of the record.

1 MR. WEINSTEIN: I want to say that I
2 offer in everything other than those
3 paragraphs that I Xed out.
4 THE COURT: Right. But that second
5 exhibit that we just marked will show the ones
6 that you Xed out. You put a line through
7 them, you can still read what's in there.
8 MR. WEINSTEIN: I brought scissors, but
9 they confiscated them when I brought it in.
10 THE COURT: So you're offering it?
11 MR. WEINSTEIN: Judge, we offer into
12 evidence. The jury has seen it and we'd like
13 to have it marked.
14 THE COURT: What is that?
15 MR. WEINSTEIN: That is part of
16 Dr. Torres's records, which show that this is
17 the correct report in this patient. We would
18 like to have it --
19 THE COURT: Any objection?
20 MR. REILLY: I don't think the reports
21 are admissible. I think the rules provide
22 they're not admissible.
23 MR. WEINSTEIN: Dr. Torres had identified
24 it. We flashed it up to the screen.
25 Everybody saw it.

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1 THE COURT: I'll allow it in. It's been
2 discussed. It's been shown to the jury.
3 May I see it for a moment?
4 MR. WEINSTEIN: In fact, we also will
5 offer into evidence, which he acknowledged,
6 his records, his billing records.
7 THE COURT: First, as to this document,
8 I'll allow this in.
9 Mark this as the next Plaintiff's
10 exhibit.
11 THE CLERK: Plaintiffs' Exhibit 2.
12 (Plaintiff's Exhibit 2 was marked in
13 evidence.)
14 THE COURT: And the billing records; is
15 there any objection?
16 MR. REILLY: I think they've already been
17 presented to the jury.
18 THE COURT: Did you say there was or
19 wasn't any objection?
20 MR. McCUE: I think it was already
21 objected to, Your Honor.
22 THE COURT: Well, I don't remember the
23 objections, sorry. What was the objection?
24 MR. REILLY: I don't think they were
25 submitted into evidence, no foundation, Your

1 Honor.
2 THE COURT: Were all of these reviewed by
3 Dr. Torres on the screen?
4 MR. TROP: Every one of them, judge, if
5 you recall, it was their case-in-chief when it
6 was done. That's why we didn't move them in
7 at that point.
8 THE COURT: I'll allow them in.
9 THE CLERK: Plaintiffs' Exhibit 3
10 composite.
11 (Plaintiff's Exhibit 3 was marked in
12 evidence.)
13 MR. WEINSTEIN: Judge, I think there's
14 one other sort of matter that I think you
15 wanted us to do for you. And you asked if we
16 would put a copy of what was out there for the
17 sign.
18 THE COURT: Okay. Mark that as a court
19 exhibit or as an ID exhibit.
20 MR. WEINSTEIN: The one that's been there
21 for so long and Your Honor said she hasn't
22 seen it.
23 THE COURT: I saw it the other day. I
24 hadn't noticed it before.
25 Please mark that. That's the sign that's

1 outside near the elevators. Mark that for ID.
2 THE CLERK: Plaintiff's 1 DD for ID.
3 (Plaintiff's Exhibit 1 DD was marked for
4 identification.)
5 THE COURT: That's fine.
6 So what is your motion for the defense?
7 MS. TEDDER: Your Honor, Defendant's move
8 for directed verdict because Plaintiff has
9 failed to prove that the Defendants
10 manufactured and sold the cigarettes whose
11 environmental tobacco smoke allegedly caused
12 the injury while she worked as a flight
13 attendant. She's failed to prove that she was
14 exposed to the environmental tobacco smoke in
15 Defendants' products. If we look at testimony
16 of the Plaintiff's witnesses in this case, it
17 is immaterial and it does not prove.
18 The evidence as introduced to show that
19 environmental tobacco smoke caused her chronic
20 sinusitis is insufficient to support a verdict
21 in her favor. In fact, that evidence
22 indicates it's more likely that something
23 other than environmental tobacco smoke caused
24 the Plaintiff's chronic sinusitis. And the
25 Plaintiff clearly failed to establish a

1 relationship between her environmental tobacco
2 smoke exposure and her chronic sinusitis.
3 And finally, the evidence does not
4 support her claim for damages.
5 Plaintiff has brought this case under
6 theories of negligence, breach of warranty and
7 strict liability, but the law, I think, in
8 this state is clear, Your Honor, that she
9 cannot prevail on a products liability claim
10 unless she establishes that the Defendants
11 manufactured the product or products which
12 allegedly caused her injury. And if she fails
13 to adduce evidence that she was injured by the
14 Defendants' product and that the product
15 caused her harm, then I think the case law in
16 this case mandates that the Court enter a
17 judgment as a matter of law.
18 If we take a look at the evidence in this
19 case, it's very clear that Plaintiff has
20 failed to prove that Defendants' cigarettes
21 caused her sinusitis. In fact, if you take a
22 look at the testimony of Ms. French in this
23 trial, the only question that was asked of her
24 specifically was a question by her counsel on
25 direct exam, which just referenced the

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1 testimony of the other witnesses before her,
2 the other flight attendants, Lani Blissard.
3 In fact, the question was asked:
4 "You heard the other witnesses testify
5 before and they talked about which brands of
6 cigarettes they saw on the airplanes. Can you
7 tell the jury whether you saw those brands or
8 any other brands?
9 "Answer: I can't think of any other
10 brands which weren't already mentioned, but
11 they were all American cigarettes."
12 And that's a cite to the trial
13 transcript, page 1205, lines 16 through 25.
14 And I think, Your Honor, this testimony
15 is woefully deficient. And what it doesn't
16 show and she doesn't say, Ms. French does not
17 say what brands she saw, when she saw them,
18 which ones were being smoked, whether she
19 herself was flying on an international flight
20 or domestic flight.
21 She's not provided any evidence of which
22 manufacturer owned or manufactured the brands
23 that were mentioned here by anyone. And she
24 must establish this, because, you know, any
25 given brand may have been made by

1 manufacturers other than the Defendants who
2 are in this case.
3 I think --
4 THE COURT: They did offer that document
5 that showed the manufacturers and the brands
6 that they manufactured during different times.
7 MS. TEDDER: But the problem they have
8 with that, Your Honor, those very same brands
9 were manufactured by manufacturers other than
10 the Defendants in this case. And they never
11 produced any evidence to show that the brands
12 that they talked about were brands
13 manufactured by the Defendants in this
14 particular case.
15 And I mean, I think if you look at the
16 testimony, the other testimony that they put
17 forth --
18 THE COURT: I'm sorry, let me just talk
19 to Judge Stenton for a moment. Excuse me for
20 interrupting you.
21 (A discussion was held off the record.)
22 MS. TEDDER: I think if we take a look at
23 the other testimony in this case by the other
24 witnesses the Plaintiff put forward, that
25 testimony is just as deficient as the

1 testimony of the Plaintiff.
2 Jason Brown testified, the Court will
3 recall, he was the former pilot that
4 testified. He admitted he never flew with the
5 Plaintiff or doesn't know when she may have
6 flown, if she flew internationally --
7 THE COURT: I know what I wanted to ask
8 you.
9 I haven't seen that exhibit showing the
10 brands and when they were manufactured, but
11 aren't at least some, if not most, of those
12 brands manufactured by these Defendants during
13 a time --
14 MS. TEDDER: Some of those brands were
15 manufactured by these Defendants, but some of
16 those brands are manufactured by parties who
17 are not Defendants in this action.
18 There's no evidence as to whether or not
19 those brands were bought at an international
20 location, whether those brands were
21 manufactured by a Defendant that's not in this
22 case.
23 Just because it says Marlboro, doesn't
24 mean that it's manufactured by the Defendant
25 in this case.

1 THE COURT: Who else manufactured
2 Marlboro?
3 MS. TEDDER: Well, they're manufactured
4 by other entities internationally, not by the
5 Defendant in this particular case. And
6 there's been no evidence in this case, Your
7 Honor, about who manufactured the brands.
8 I mean, just saying the word, you know,
9 the brand name does not establish who
10 manufactured the brand.
11 THE COURT: Well, I thought that exhibit
12 said these are the brands that were
13 manufactured by these Defendants under those
14 years.
15 MS. TEDDER: Yes, that response admits
16 that there were brands manufactured by these
17 Defendants. It does not say, and Plaintiff
18 didn't introduce any evidence to show, that
19 these are the only Defendants who manufactured
20 those brands.
21 THE COURT: Well, I think that's just --
22 I mean, what about the answer to the
23 interrogatory that talked about the market
24 share?
25 MS. TEDDER: Well, I think market share

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1 is an entirely different issue, Your Honor.
2 And I don't think at this juncture --
3 Plaintiff hasn't pled market share in this
4 case. It's not in the complaint. The Court
5 never granted Plaintiff leave to offer market
6 share. They never had an evidentiary hearing
7 prior to the trial of this case to try to
8 adduce market share. The only instance is in
9 DES cases, only when there's an inherent
10 inability to identify the manufacturer of a
11 product. And you have to come forward at that
12 evidentiary hearing prior to the trial and
13 establish that for the Court. And certainly
14 in this case it was never even pled in the
15 complaint, Your Honor.
16 There is no, you know, there is no, I
17 mean, market share isn't a part of this case.
18 It wasn't in the complaint. They never asked
19 for the evidentiary hearing. They've never
20 shown this Court that they made a good faith
21 effort to try to determine the manufacturers
22 of the product and that they were somehow
23 unable to determine who manufactured the
24 product.
25 And if you look at the DES cases, they

1 were the only cases in which that theory has
2 been allowed. And it's only been allowed
3 because the products were manufactured all
4 according to the same formula. They were put
5 in containers, who people then didn't specify
6 the manufacturer of the product.
7 The market share theory is completely and
8 wholly inapplicable in this case. That
9 leaves them with only the traditional elements
10 of the Florida law and what you have to prove.
11 And in order to prove that, you have to prove
12 you were harmed by a product manufactured by
13 the Defendant in the case.
14 And in this instance, Your Honor, they
15 have wholly and completely failed to do that.
16 There is not one witness that they have put
17 forward to talk about which brands, what
18 flights they were on, when those brands were
19 seen and who manufactured it. Absolutely no
20 evidence about who manufactured those brands.
21 No evidence about the flights Plaintiff flew,
22 to what destinations she flew.
23 THE COURT: I'm going to consider this.
24 I'm going to let it go to the jury.
25 There would be no reason to think that

1 the brands people were smoking would be
2 different on a flight from Chicago to New York
3 than from L.A. to Phoenix or something.
4 MS. TEDDER: But, Your Honor, we have no
5 idea where those people would be. Just
6 because she was on a flight doesn't mean those
7 people didn't come from somewhere in Europe to
8 Chicago.
9 THE COURT: Well, she did say they were
10 all American brands.
11 MS. TEDDER: She identified names of
12 brands.
13 THE COURT: And said they were all
14 American brands.
15 MS. TEDDER: But, Your Honor, saying they
16 are American brands is insufficient to show
17 that those cigarettes were manufactured by the
18 Defendants in this case.
19 THE COURT: I'm going to let it go to the
20 jury.
21 MR. ENGRAM: Your Honor, can I make two
22 specific points? One is that the evidence
23 that the Plaintiffs are introducing in this
24 case from interrogatory responses of RJ
25 Reynolds Tobacco Company refer only to market

1 share by year. There is no enumeration of
2 brands in the discovery responses filed with
3 the Court as to RJ Reynolds.
4 THE COURT: What were the brands -- I
5 haven't seen those documents.
6 MR. ENGRAM: There were no brands
7 enumerated in the discovery responses of RJ
8 Reynolds.
9 THE COURT: Well, who supplied the
10 information of the brands?
11 MR. ENGRAM: No one did.
12 THE COURT: That wasn't part of the
13 answers to interrogatories?
14 MS. WEINSTEIN: Your Honor, in that
15 interrogatory answer, RJ Reynolds did not list
16 the brands. They referred us to, I believe,
17 another case. Instead of answering the
18 interrogatory, they said that they provided
19 that information to somebody else and some
20 other lawyer and told us --
21 THE COURT: I don't have the document in
22 front of me, but what does it say about the
23 brand and where did that come from?
24 MS. WEINSTEIN: The interrogatory, I
25 believe, asked for the names or the identities

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1 of cigarettes manufactured by each Defendant
2 and the year that they were manufactured.
3 THE COURT: And so RJ Reynolds didn't
4 answer that?
5 MS. WEINSTEIN: No, they refused to
6 answer it, said it's in another case, go get
7 it.
8 THE COURT: So you don't have any
9 interrogatory answer that refers to brands
10 manufactured by RJ Reynolds?
11 MS. WEINSTEIN: No, we don't really think
12 it matters.
13 MR. WEINSTEIN: This was not supposed to
14 be litigated, judge, from the very beginning.
15 THE COURT: But it's not there?
16 MS. WEINSTEIN: Correct.
17 MR. ENGRAM: The second point is, Your
18 Honor, if you do add up the market share for
19 any given year, the number is well less than
20 100 percent. And for them to say that it's
21 all American brands doesn't implicate the
22 Defendants when there are other manufacturers
23 both in the United States and internationally.
24 THE COURT: What does it add up to?
25 MR. ENGRAM: It varies from year to year.

1 I think one --
2 THE COURT: What's the lowest? 80
3 percent, 90?
4 MR. ENGRAM: One calculation I thought I
5 had was 67 percent one year.
6 THE COURT: In other words, these
7 Defendants totally manufactured 67 percent of
8 American cigarettes in a certain year?
9 MR. ENGRAM: Of the American market that
10 year.
11 MR. WEINSTEIN: Judge, remember I think I
12 should throw out this to Your Honor. First of
13 all, this is nothing that we anticipated
14 trying. I think Your Honor threw this out to
15 us during the trial that all of these cases
16 came to be tried on whether or not ETS,
17 pursuant to an agreement. There's nothing in
18 the agreement that even addresses this.
19 Moreover, judge, before 1986, you may
20 remember, judge, that we had joint and several
21 liability. A lot of the injuries occurred
22 prior. The reason why I'm mentioning that --
23 THE COURT: This is a little different
24 subject.
25 I'm going to deny the motion for directed

1 verdict on this ground at this time. But
2 really there's a bigger question about this.
3 And that is, should the Defendants be allowed
4 to argue this to the jury?
5 MR. REILLY: We're happy to address that
6 one, Your Honor, because there's absolutely
7 nothing in the settlement agreement. In fact,
8 there's specific language in the settlement
9 agreement that provides that no other burdens
10 of proof are altered in any way. That's why
11 Mr. Weinstein can't get up and cite you some
12 portion of the settlement agreement that says
13 they don't have to prove that it was our
14 products that caused the harm that the
15 Plaintiff claims she suffers. That's the
16 problem that the Plaintiffs have. The
17 language is clear in the settlement agreement
18 that all other burdens of proof remain the
19 same.
20 MS. WEINSTEIN: Judge, we wouldn't be
21 here today if these were not the Defendants
22 that are part of the settlement agreement.
23 Nobody would be bringing an individual claim
24 if they had to go out and prove that in 1984
25 on a flight from Madrid to JFK I saw a pack of

1 Camel cigarettes in seat 22C by the window.
2 And I remember that because it was a very
3 shiny package and it caught my eye. Then in
4 1989 I was on another flight and I saw a woman
5 smoking Virginia Slims cigarette. And I
6 remember it was Virginia Slims because I
7 remember going to the tennis tournament and I
8 got a T-shirt.
9 THE COURT: So it's the Plaintiff's
10 position that the Defendants should not be
11 permitted to argue this?
12 MS. WEINSTEIN: Absolutely.
13 MR. REILLY: But based on what? On
14 Florida law or the settlement agreement?
15 THE COURT: I guess based on the
16 settlement agreement.
17 MR. REILLY: That's the point.
18 MR. WEINSTEIN: Your Honor, still, it's
19 what other judges have ruled. It still -- in
20 other words, it's persuasive I think is the
21 word, they made the same argument before Judge
22 Wilson. And he summarily denied it.
23 THE COURT: That's the only judge that
24 ruled on this.
25 MR. REILLY: Judge Wilson didn't deny it,

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1 he didn't deal with it.
2 THE COURT: I think it's something to
3 discuss. I don't know that I'm going to allow
4 the Defendants to make this argument to the
5 jury. I wish I could figure out a way to do
6 it both ways. But I'll think about that.
7 Anyway, I'm going to deny the motion for
8 directed verdict on that ground.
9 MS. TEDDER: There are other grounds and
10 I would point out with respect to that that
11 Dr. Persky, Plaintiff's treating doctor, who
12 said she developed chronic sinusitis from
13 exposure to ETS does not identify what ETS
14 he's talking about or explain when the ETS
15 exposure occurred.
16 Having said that, Your Honor, the next
17 ground upon which we would move for directed
18 verdict is that Plaintiff has failed to meet
19 the burden on proximate cause to show that ETS
20 caused her injuries.
21 In fact, the law in Florida is that a
22 Plaintiff must introduce evidence which
23 affords a reasonable basis for the conclusion
24 that it is more likely than not that the
25 conduct of the Defendant was a substantial

1 factor in bringing about the result. A mere
2 possibility of causation is not enough.
3 And, in fact, in this particular case the
4 evidence suggests that there is no more than a
5 mere possibility that ETS caused her chronic
6 sinusitis.
7 Dr. Persky admitted on cross examination
8 that there were many other very significant
9 factors and causes that exist in this
10 particular case. For example, he talked about
11 her allergies as a significant cause of her
12 chronic sinusitis. He talked about her
13 anatomical defects. He talked about the scar
14 tissue. He even admitted that he was very
15 interested in pursuing every one of those
16 things. They're in his notes that were put
17 into evidence before the jury. That he
18 believes that all of those are very
19 significant and should be followed up on and
20 are potential causes of her chronic sinusitis.
21 He also talked about the fact that flight
22 attendants have been exposed to bacteria,
23 viruses --
24 THE COURT: I think that's an argument
25 that you can make to the jury. I'm not going

1 to grant a directed verdict on that. But I'm
2 sure it's going to be part of your argument to
3 the jury.
4 MS. TEDDER: Along with that, Your Honor,
5 she's failed to establish that there's any
6 kind of relationship between her ETS exposure
7 and her chronic sinusitis.
8 THE COURT: That's the same.
9 MS. TEDDER: Yes, it goes along with that
10 argument. Dr. Persky acknowledged that it was
11 acute and not chronic sinusitis that he was
12 treating prior to her surgery. He's never
13 been able to make a connection between her
14 visits to his office and exposure and chronic
15 sinusitis.
16 And the last ground we would have, Your
17 Honor, is that her evidence of damages, to the
18 extent she's claiming damages for disability,
19 disfigurement, loss of capacity of enjoyment
20 of life, medical care and expenses, there's
21 been no evidence to support that in this case.
22 THE COURT: Well, I don't know that
23 there's any -- I was going to say I don't know
24 that there's any evidence of disfigurement.
25 MR. WEINSTEIN: There is disability. But

1 you are correct, judge, there is no evidence
2 of disfigurement.
3 MS. TEDDER: There's no evidence of
4 disability.
5 THE COURT: Let's take out disfigurement
6 by agreement.
7 Now, disability, I guess it depends how
8 you define disability. And the instructions
9 don't define it.
10 There's no claim for economic damages.
11 So if you're considering disability as an
12 economic damage, there wouldn't be evidence of
13 it. But the term disability is used in the
14 instructions in the noneconomic damages. So I
15 think it's used in a broader way. I think
16 that we'll keep that one in. We'll take out
17 disfigurement.
18 MR. ENGRAM: Your Honor, was there any
19 evidence during the trial testimony about
20 anything that she could not do? There was
21 never any claim to support disability.
22 THE COURT: Was there?
23 MR. WEINSTEIN: Well, was there any
24 testimony?
25 THE COURT: I'll let the Plaintiffs think

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1 about that and see if you come up with
2 anything.
3 MS. TEDDER: Same thing with respect to
4 loss of capacity for the enjoyment of life,
5 Your Honor.
6 MS. WEINSTEIN: Judge, she testified that
7 she --
8 THE COURT: That just comes along with
9 any type of -- if they think she has this
10 disease and that it causes her problems, I
11 don't think you have to say specifically
12 anything about the loss of capacity to enjoy
13 life. But disability you might be right if
14 she didn't say anything about things that she
15 was unable to do.
16 MS. TEDDER: We'll pull that for the
17 Court.
18 MR. WEINSTEIN: It is sort of an overall.
19 THE COURT: We could leave that word out,
20 too, and instruct on the instruction that goes
21 along with the pain and suffering.
22 MR. WEINSTEIN: Disabled because you're
23 uncomfortable.
24 THE COURT: I guess there at least is the
25 concept in disability that you're unable to do

1 something that you could have done before,
2 aside from work, which would be a separate
3 economic damage, which you're not claiming.
4 But, you know, like play tennis or have fun.
5 I don't know, whatever it would be. I'm not
6 sure that she said anything.
7 MR. McCUE: Your Honor, respectfully on
8 the issue of her capacity to enjoy life,
9 again, the Court is making a leap here that
10 there is some loss, there is no evidence that
11 there was a loss, there was no direct
12 testimony from the Plaintiff herself.
13 THE COURT: I don't know. If someone is
14 sick and they say they've got headaches and
15 this problem and that problem and the other
16 problem, I think it kind of automatically
17 follows that there's a loss of the capacity
18 for enjoyment of life. Any illness I think
19 would probably carry that.
20 MR. McCUE: But those are inferences.
21 THE COURT: That's the way I see it.
22 MR. McCUE: However, it is the burden of
23 the Plaintiff to prove by clear and convincing
24 evidence that she had that.
25 THE COURT: If she's proved the illness,

1 she's proved that. But disability I think you
2 might be right. Disfigurement we'll
3 definitely take out.
4 Plaintiff might have a motion, too, but
5 I'll hear that later.
6 The question is when will we meet again?
7 And I think 3:00 today. I'll hear the rest of
8 the motions, we'll go over the instructions
9 and I'll see you then.
10 MR. REILLY: Your Honor, if I could, I
11 think we'll take this up at 3:00, but there is
12 an instruction here that the Plaintiffs want
13 that relates to aggravation. If we didn't
14 include aggravation in our motion for directed
15 verdict and if you think it needs to be there,
16 then I would supplement.
17 THE COURT: I'll hear you on the
18 instructions and I'll consider it as a motion
19 for directed verdict, too.
20 MR. WEINSTEIN: Judge, I'm not only going
21 to make a motion for directed verdict, but
22 also a motion to amend to conform to evidence.
23 But we'll take that up at 3:00.
24 THE COURT: Thank you.
25 (A lunch recess was taken at 11:15 a.m.)

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